No. 81-523

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ALEXANDER L. STEVAS,
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IN THE SUPREME COURT
Of The
UNITED STATES

October Term, 1981

CONTAINER CORPORATION OF AMERICA,
Appellant,
vs.
FRANCHISE TAX BOARD,
Appellee.

On Appeal From the Court of Appeal
of the State of California
for the First Appellate District

MOTION TO NOTE PROBABLE JURISDICTION AND TO HEAR CASE IN TANDEM WITH CHICAGO BRIDGE & IRON, ASARCO AND WOOLWORTH CASES

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American Smelting & Refining Co. v. Idaho State Tax Commission, 99 Idaho 924, 592 P.2d 39 (1979), vacated and remanded sub nom. Asarco Inc. v. Idaho State Tax Commission, 445 U.S. 939 (1980), per curiam on remand, 102 Idaho 38, 624 P.2d 946 (1981), prob. juris. noted, No. 80-2015 (U.S. Sup. Ct. October 5, 1981)..1, 5

Chicago Bridge & Iron Co. v. Caterpillar Tractor Co., Illinois Department of Revenue, 84 Ill. 2d 102, 417 N.E. 2d 1343 (1981), prob. juris. noted, No. 81-349 (U.S. Sup. Ct. November 9, 1981).....1, 5

F. W. Woolworth Co. v. Taxation and Revenue Department, 95 N.M. 519, 624 P.2d 28 (1981) prob. juris. noted, No. 80-1745 (U.S. Sup. Ct. October 5, 1981).....1, 5

MOTION TO NOTE PROBABLE JURISDICTION AND TO HEAR CASE IN TANDEM WITH CHICAGO BRIDGE & IRON, ASARCO AND WOOLWORTH CASES

For the reasons which follow, appellant respectfully moves the Court to note probable jurisdiction in Container Corporation of America v. Franchise Tax Board, No. 81-523, and to hear that case in tandem with Chicago Bridge & Iron Company v. Caterpillar Tractor Co., Illinois Department of Revenue, et al., No. 81-349, prob. juris. noted, Nov. 9, 1981; Asarco Inc. v. Idaho State Tax Commission, No. 80-2015, prob. juris. noted, October 5, 1981; and F. W. Woolworth Co. v. Taxation and Revenue Department, No. 80-1745, prob. juris. noted, October 5, 1981.

On Monday, November 9, 1981, the Court noted probable jurisdiction in the Chicago Bridge & Iron Company ("CBI")

case, to be heard in tandem with the Asarco and Woolworth cases. The Court took no action in the Container Corporation of America ("Container") case. Appellant suggests that it would be helpful to the Court to note probable jurisdiction in the Container case because of the fully developed record in the case relating to the constitutional issues involved as opposed to the CBI case which does not have such a record.

The record in the Container case was specifically developed to provide a basis for considering the constitutional issues which arise from the application of worldwide unitary combination to a United States corporation and its foreign subsidiaries and affiliates. The Container record sets forth the severe misattribution of income from the Container foreign subsidiaries to the parent company and

to California resulting from the application of worldwide combination. The record also presents graphic examples of double taxation of income as a result of the imposition of tax by California and by the countries in which the subsidiaries operate, particularly Colombia, Venezuela and Holland.

Therefore the record in the Container case (which is based upon a stipulation of facts and undisputed expert testimony) specifically illustrates how worldwide unitary combination causes the taxing state to tax income earned outside the state, and indeed outside the United States, in violation of the due process and commerce clauses. The record also demonstrates why such combination results in multiple taxation and prevents the federal government from speaking with one voice in the field of

foreign tax policy in violation of the commerce clause. These important constitutional issues have not previously been considered by this Court.

On the other hand, the record in the CBI case was not developed to present these constitutional issues. That record was developed by Caterpillar Tractor Company and the Illinois Department of Revenue, who agreed upon the application of worldwide unitary combination to Caterpillar and only disagreed about certain state issues. These state issues are not presented to this Court by CBI. CBI was one of several intervenors in the Caterpillar Tractor case before the Illinois courts, and, as such, did not present evidence in the case.

It is respectfully submitted, therefore, that it would be helpful to

the Court to note probable jurisdiction in the Container case, thereby providing the Court with a fully developed record upon which to consider the important constitutional issues raised by worldwide unitary combination.

In order to expedite the Court's consideration of the Container case in tandem with the CBI, Asarco and Woolworth cases, Appellant is prepared to submit its opening brief within the same time period afforded CBI for filing its opening brief, i.e., 45 days from November 9, 1981.

Counsel for CBI have stated that they have no objection to the

motion herein made by counsel for Container.

Dated: November 11, 1981

Respectfully submitted,

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